

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DYMATIZE ENTERPRISES, INC.,

Plaintiff,

v.

MAXIMUM HUMAN PERFORMANCE,
INC.,

Defendants.

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CIVIL ACTION NO. 3:09-cv-0046-O

MOTION FOR LEAVE TO FILE DECLARATION
IN SUPPORT OF EXPERT REPORT,
AND BRIEF IN SUPPORT

TO THE HONORABLE COURT:

Defendant and Counterclaimant Maximum Human Performance, Inc. ("MHP") files this, its Motion for Leave to File Declaration in Support of Expert Report (the "Motion"), and in support respectfully shows the Court as follows:

1. On May 12, 2010, Dymatize Enterprises, Inc. ("Dymatize") filed its Brief in Support of its Reply to Defendant's Opposition to Plaintiff's Second Motion for Summary Judgment (Doc. No. 86) ("Dymatize's Reply Br."). In this Reply Brief, Dymatize for the first time objected to the signed report of MHP's expert, Dr. Seymour D. Levine, on the grounds that Dr. Levine's report was unsworn. (Dymatize Reply Br. at pp. 4-5).

2. MHP does not concede that the opinions contained within an expert report must be sworn. To the extent that Dymatize is contending that the signed expert report of Dr. Levine has not been authenticated, that contention is incorrect, because Gerard Dente, the president of MHP, submitted a declaration as part of the summary judgment record that identified, attached

and referred to the signed expert report of Dr. Levine. (*See* MHP's Sealed Appendix (Doc. No. 84) p. 80 [Dente Decl. at ¶ 16]; App. pp. 145-55 [Ex. H, Expert Report of Dr. Seymour Levine]).

3. Nevertheless, if there is some procedural defect regarding the admissibility of Dr. Levine's report, such defect is readily curable by a declaration or affidavit of Dr. Levine in support of his signed expert report that is already part of the summary judgment record of this case. *Seitz v. Envirotech Systems Worldwide, Inc.*, 2007 WL 1795679, **11-12 (S.D. Tex. June 19, 2007); *Straus v. DVC Worldwide, Inc.*, 484 F. Supp.2d 620, 633-34 (S.D. Tex. 2007); *Capobianco v. City of New York*, 422 F.3d 47, 55 (2nd Cir. 2005); *see also Maytag Corp. v. Electrolux Home Prods.*, 448 F. Supp. 1034, 1065 (N.D. Iowa 2006); *Feltner v. Partyka*, 945 F. Supp. 1188, 1191 (N.D. Ill. 1996).

4. Local Rule 56.7 requires MHP to seek leave of Court to file supplemental evidence in connection with a motion for summary judgment. MHP seeks leave to file the declaration of Dr. Levine contained in the Supplemental Appendix submitted contemporaneously with this Motion. The declaration of Dr. Levine does not substantively alter Dr. Levine's signed expert report in any way; it raises no new arguments; it presents no new facts or opinions, and it does not prejudice Dymatize. Dr. Levine's declaration simply cures, to the extent a cure is necessary, any procedural defects regarding the admissibility of Dr. Levine's signed expert report. Accordingly, to the extent there is some procedural defect regarding the admissibility of Dr. Levine's expert report, MHP respectfully requests that the Court permit Dr. Levine's declaration to be incorporated into the summary judgment record of this proceeding in accordance with Local Rule 56.7, and that the Court consider this declaration in connection with MHP's Response and Brief in Opposition to Dymatize's Second Motion for Summary Judgment (Doc Nos. 71, 83).

5. Dymatize is apparently not opposed to the *relief* sought herein, and has stated in writing to counsel for MHP that Dymatize “. . . will not oppose the supplementation of your response with a sworn copy of Dr. Levine’s expert report.” However, counsel were unable to timely agree on the wording of this Motion, and thus it is presented to the Court for resolution.

DATED: May 14, 2010.

Respectfully submitted,

/s/ Prescott W. Smith

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CERTIFICATE OF CONFERENCE

On May 14, 2010, I conferred with Katherine B. Bandy, counsel for Dymatize, via phone and e-mail, and she indicated via e-mail that Dymatize “. . . will not oppose the supplementation of your response with a sworn copy of Dr. Levine’s expert report.” Counsel were not able to agree upon mutually satisfactory language for this Motion on a timely basis, and thus it is presented to the Court for resolution.

/s/ Prescott W. Smith
Prescott W. Smith

CERTIFICATE OF SERVICE

The undersigned certifies that on this 14th day of May, 2010, pursuant to Federal Rule of Civil Procedure 5 and Northern District Local Rule 5.1(d), a true and correct copy of this document was served upon all attorneys of record, via ECF electronic mail.

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/s/ Prescott W. Smith
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